DCWM

DONELAN CLEARY
WOOD & MASER, P.C.

Ms. Magalie Roman Salas
Secretary
Federal Communicaitons Commission
445 12 th St. SW
Washington, DC 20554

January 28, 2000

Re: CC Docket No. 94-102
E-911 Proceeding

Dear Ms. Salas:

Transmitted herewith on behalf of CorrComm, L.L.C. is its Petition for Reconsideration in the above-referenced Docket. Since the Petition is being filed electronically, only an original is being filed.

Please contact the undersigned should you have any questions concerning this matter.

Yours very truly,

Donald J. Evans

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Revision of the Commission's Rules	)	CC Docket No. 94-102
To Ensure Compatibility with	)	RM-8143
Enhanced 911 Emergency Calling Systems	)	

To: The Commission

PETITION FOR RECONSIDERATION

OF

CORRCOMM, L.L.C

Date: January 28, 2000

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TABLE OF CONTENTS

SUMMARY

CorrComm, L.L.C., a small CMRS carrier, petitions the Commission to reconsider its elimination of the requirement that implementation of Phase II of E-911 be conditioned on adoption of a cost recovery mechanism. The elimination of this requirement was not previously proposed by the Commission, and CorrComm therefore did not participate to comment on the deleterious effects of this proposal.

CorrComm provides financial information indicating that the costs of providing an ALI E-911 system are considerable for any carrier, but for a small carrier these costs must be spread over a smaller number of subscribers with no corresponding revenue enhancement. This circumstance has several legal consequences. In principle, the new regulatory scheme improperly imposes a public burden on private parties when the burden should be shared by society at large through various potential mechanisms.

The E-911 service should have been defined by the Commission to be a universal service, as permitted, if not required, by the '96 Telecom Act. When so defined, the service would qualify for either state of federal universal service support from the funding mechanisms established for those purposes. This would spread out to all interstate or intrastate telecommunications carriers the cost of providing a subsidized public benefit, as contemplated by Congress.

The Commission paid lip service to, but did not realistically address, the significant adverse consequences of its action on small businesses, as required by the Regulatory Flexibility Act. Unless the Commission considers and justifies its action, its action violates the RFA.

The Commission's action is adverse to potential competition between CMRS carriers and wireline carriers because it imposes a very substantial burden on only one of the two competitors. By hindering competition, the Commission failed to follow the national pro-competitive policy established by Congress in the '96 Act.

Because the burden imposed on CMRS carriers is out of proportion to, and not justified by, any potential public harm associated with their licenseeship, the regulation is a compensable taking under Supreme Court precedent.

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PETITION FOR RECONSIDERATION

CorrComm, L.L.C. ("CorrComm"), by its attorneys, hereby petitions the Commission to reconsider its Second Memorandum Opinion and Order ("Second MO &O")[1] in the above-captioned proceeding. CorrComm did not participate in the last round of Commission proceedings in this Docket because it was unclear from the initial filings that the Commission was considering the dramatic reversal of the funding mechanism for E-911 Phase II which had been adopted in the First Report and Order[2]. Neither of the Petitions for Reconsideration or Clarification filed in this Docket requested the Commission to drop the requirement that a mechanism for recovering the cost of E-911 be in place prior to its implementation by carriers. Indeed, the CTIA Petition for Reconsideration requested that the cost recovery mechanism be more clearly defined, not that it be deleted. Thus, CorrComm was not on notice that the Commission was considering on its own motion the abandonment of a major pillar of its E-911

[1] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Second Memorandum Opinion and Order, FCC 99-352, released December 8, 1999.

implementation structure. Because the elimination of a publicly based cost recovery mechanism for E-911 service will have a severe, if not destructive, impact on smaller CMRS carriers like CorrComm, reconsideration of that specific element of the decision is requested.

BACKGROUND

CorrComm is one of many small CMRS carriers which continue to operate around the country despite the consolidation of the cellular and PCS industries which has taken place over the last decade. CorrComm provides cellular service in the Alabama 1 RSA, and it is completing plans to roll out PCS service in nearby parts of Alabama this year. The potential customer base in a rural area like Alabama 1 is relatively small. There are only 175,000 people in the RSA (1990 Census), and penetration rates of even 20% would be considered high in a non-industrial area like this. To serve this market, CorrComm plans to have approximately 30 cell sites in service by the end of the year 2000. It had been preliminarily informed that the cost of the E-911 equipment will be approximately $75,000 per cell site – a figure roughly equivalent to the entire embedded cost of the existing cellular infrastructure. More recent cost estimates suggest that hardware per cell site to implement ALI will be on the order of $25,000 per cell site, with an additional $400,000 required for hardware and software modifications to the switch. These one-time numbers do not include the estimated $44,240 in *monthly* recurring costs for DSO, trunks to PSAPs, and service bureau costs. By any measure, an economic

[2] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 18676 (1996).

burden which increases the required investment in plant by 100% with no corresponding increase in productivity and no increase whatsoever in anticipated revenue must be considered crushing.

The Commission's Second MO &O essentially shrugs off this burden by leaving it to each carrier to recover the cost in its own way. To be sure, some states may adopt recovery mechanisms funded out of the public coffers or otherwise spread among the population at large. Now that the Commission has placed the obligation on the CMRS carrier to bear this burden, however, the states have every incentive *not* to adopt such mechanisms. It is no answer to say that the costs can be recovered from the CMRS carrier's own customers, for in the case of a small carrier, the burden on the relatively small customer base would itself be intolerable. CorrComm cannot reasonably expect to have more than 20,000 customers by the end of calendar year 2000. Amortizing the costs of E-911 over 5 years, the cost burden would still require an increase in charges to customers of some 5 – 15%, depending on the individual's cost plan. Increases on this order would outrage customers and be directly contrary to the general downward trend in CMRS rates which have resulted from increased competition.

Congress has repeatedly emphasized its desire to have small businesses remain a part of the CMRS industry. One example of this intention is the small business opportunity which Congress incorporated into the licensing scheme for frequencies which are offered by the Commission at auction. *See* 47 U.S.C. §§ 309(j)(4)(C) and (D). Yet the effect of this single new burden will potentially be devastating on small CMRS carriers. The Commission's Regulatory Flexibility Act analysis in the Second MO & O was perfunctory at best. Perhaps because the issue had not been fully put out for public

comment, the Commission seems not to have recognized that small businesses will be particularly, and perhaps even fatally, burdened by the new regulation. On the contrary, the RFA analysis somehow concludes that "few, if any, small entities would be negatively affected by its removal of the cost recovery mechanism for carriers and, instead, expected that the overall costs for carriers would be less as a result of this Order." Second MO & O, Appendix C-9. This conclusion is utterly at odds with both the facts and common sense.

A. The Commission's Placement of a Public Burden on Private Firms is Unjust

In the sections that follow, CorrComm will point out a number of respects in which the Commission's action violates the law or the Constitution, but there is an overriding philosophical principle which embraces and informs the panoply of arguments laid out below. The E-911 service is a benefit which is at heart a public service. No one questions that the service has value to people in distress or in emergency situations, and CorrComm has never argued against the institution of the service per se. It is one of the wonders of modern wireless technology that services like ALI are imaginable, much less feasible, as a way of providing aid to distressed people. But it is also a particularly costly service. It is one which is unjustified by demand from current cellular customers given the cost factors involved. Stated in economic terms, the demand for the service is insufficient by a wide margin to justify the investment necessary to buy and install the new plant, upgrade the software and hardware, and maintain the system. If people wanted it and were willing to pay for it, E-911-like services would already have been

installed. Indeed, under the current configuration of the rules, E-911 must be provided to persons who are not even customers of the carrier providing the service. The carrier has no hope of recovering even a portion of the cost of the service from people who will be using and benefiting by it. Any service which must be provided to people without the expectation of payment is by definition a philanthropic or public enterprise, not a commercial one. And therein lies the rub.

As a matter of principle, a service which is to be provided to the people of the United States as a benefit of their being in this country should be provided by the people of the United States. We, as a people, can decide that certain services such as Medicaid or drug counseling or child care services are elements of life which we as a society want for all of our people, whether they all can afford them or not. But having made such a decision, the state cannot simply decree that some smaller subset of society should pay for the provision of that benefit. No one would claim, for example, that Congress could take care of the health care crisis by simply requiring doctors to provide health care for free to people who cannot otherwise afford it. That would surely take care of the public problem, but it would shift the expense of the solution to private individuals. Most people would see such a policy as constituting a benevolent kind of involuntary servitude. It would be no defense to say that the doctors could simply increase their charges to other paying patients to make up for the lost fees. All that does is shift the burden to another small subset of the public at large. In a word, the public may not and should not shift public obligations to private parties. The benefit is a benefit to society at large and, as a matter of fundamental fairness and justice, it is society which should fund the provision of the benefit.

This basic principle is fundamental to American jurisprudence. It is the philosophical underpinning to the notion of private property that is part of the very woof and weave of the Constitution. It is found in the "takings" clause of the Fifth Amendment. It is found in the prohibition on involuntary servitude of the Thirteenth Amendment. It is found in the Third Amendment prohibition on the quartering of troops in private homes. The basic right of persons to be secure in their property was a large part of what the Revolution of 1776 was about. The Commission's action here was almost casually antithetical to that most American of principles: it places on the shoulders of private corporate citizens an obligation which is properly the state's.

B. The Commission's Action Violates Universal Service Principles of the '96 Act

Quite apart from this departure from our most basic notions of the uses of private property for the public good, the Commission's action flies directly in the face of more recent authority. The 1996 Telecommunications Act [3]established a mechanism to eliminate the "hidden" subsidies which had long been used to keep down the cost of telephone service in rural and high cost areas. Congress decided, as a matter of policy, that if the public good demanded a subsidy of particular telecommunication services, that subsidy should be explicit and the cost of providing the subsidy should be borne by all.[4] The universal service funding mechanism was established so that all carriers would contribute to subsidize socially worthy goals. Underlying this quantum shift in the regulatory paradigm was the concept that the companies which were providing the

[3]47 U.S.C. § 151 *et seq.*
[4] Conf. Rpt. at p.131

services in need of subsidy could not simply be ordered to provide the service at a low cost and then somehow recover the difference from their other customers. Congress recognized that telecommunications was a national network, that a subsidy to one part of the network affects the whole, and that the entire telecommunications infrastructure should share in the cost of providing the subsidy.[5] ("In keeping with the conferees' intent that all universal service support should be clearly identified, [254(e)] states that such support should be made explicit and should be sufficient to achieve the purposes of new Section 254." Conf. Rpt. at 131.)

At a minimum, in CorrComm's view, the Commission should have recognized E-911 service as a universal service under Section 254(c) (1) of the '96 Act. To the extent that it is an interstate service, the Commission and an appropriate Joint Board could then have identified the very real subsidy which is taking place and imposed appropriate cost recovery obligations on all interstate telecommunications carriers, as contemplated by the Act. Section 254(c) of the '96 Act defines universal service as "an evolving level of communications services that the Commission shall establish periodically." In determining which particular services are included, the Commission and the Joint Board have been given considerable discretion, but they must consider the extent to which the particular services in issue:

(A) are essential to education, public health or public safety:

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[5] To be sure, the subsidization of high cost and rural telecommunications providers and schools and libraries is, in our view, a benefit to society at large that should be paid for by society at large through general taxes. The imposition of the universal service obligation on only telecommunications carriers is therefore itself a deviation from the principles asserted above. Nevertheless, Congress recognized that the burden of these benefits had to be spread widely across society at large. It attempted to do that by making all interstate service providers share in the tab.

(B) have, through the operation of market choices by customers, been subscribed to by a majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience and necessity.

Section 254(c)(1). The following section of the Act authorizes the Commission to change the definition based on recommendations from the Joint Board.

What Congress seems to have intended is that the Commission, with recommendations form the Joint Board, should identify services which are generally available to the residential public and are worthy of support by virtue of being essential to public health or safety. It cannot be disputed that ALI-type service is or will be available to most landline residential customers and that it is essential to public safety within the meaning of the Act. It is unclear why the Commission could not simply have designated E-911 Phase II as a universal service, thus permitting the cost support to be supplied to CMRS carriers via the normal universal support funding mechanisms. This could be done either at the federal level or the state level, since the Act specifically contemplates State-based support for universal service for intra-state services. In that event, *all* telecommunications providers in the state would contribute to the service, not just the CMRS carriers who provide it. This approach would have clearly identified the service as one which is, in effect, a public obligation, and would then have appropriately spread the cost out to all carriers via their contributions to the USF. This seems to have been precisely the direct and explicit approach to subsidies which Congress intended. By

requiring a small subset of carriers to subsidize a universal-type service to the public without any universal support mechanism, the Commission violated two of the express principles of universal service enunciated in the '96 Act:

> All providers of telecommunications service should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service; and
>
> There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

Congress gave the Commission the tools, the authority and the guidance to call a spade a spade and a subsidy a subsidy; it established the USF as a mechanism to support the provision of this very kind of worthwhile public safety goal. The Commission's refusal to even consider application of these principles to E-911 is both perplexing and at odds with the statutory mandate.

C. The Commission Failed to Consider the Effects of Its Action on Small Businesses

As indicated above, the imposition of E-911 Phase II obligations on small cellular carriers will involve a burden which is disproportionally great on these carriers. The available evidence indicates that, in the absence of a broadly based support mechanism, the burden will drastically affect costs, rate structures and, ultimately, profits of such businesses. The Commission's analysis assumed rather cavalierly that a cellular carrier may simply pass any cost on to its customers, and those customers will be willing to bear that cost. Not only is this untrue, but the Commission's cursory compliance with the Final Regulatory Flexibility Analysis requirement, 5 U.S.C. § 604, fails by a wide margin

to meet the standards Congress intended before regulations of this very kind were imposed on small businesses.

The Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 *et seq.*, requires a Final Regulatory Flexibility Analysis (FRFA) be prepared before an agency issues any final rule. The FRFA must contain the following:

> (1) A succinct statement of the need for, and objectives of, the rule;
> (2) A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
> (3) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
> (4) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
> (5) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a).

Although the Commission has provided perfunctory information to satisfy the first four requirements listed, it has fallen far short of satisfying the fifth obligation.

The Commission is required to include in its FRFA "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes" (*Id.*). Let there be no mistake: what the Commission did was to shift the burden of financing Phase II of E-911 to the carriers, including small carriers. While there is the possibility that alternative mechanisms will be adopted by the States, the obligation to provide E-911 attaches regardless of whether

the states provide relief or not. In the Second MO & O, the Commission states that it "took action to modify the E911 cost recovery rule" and that "(t)he Commission considered the alternative of adopting specific definitions requested by some rural carriers to impose a mandate on States to adopt particular mechanisms, but determined that the additional requirements would be difficult to interpret, apply, and enforce", Second MO & O, Appendix C-9. It then went on to eliminate cost recovery from the rule completely, without discussion or apparent recognition of the adverse effect on small businesses. These actions can hardly be construed as steps to minimize the significant economic impact on small entities.

The Commission also stated that "(t)he order was not mandating self-recovery as the only cost recovery option or prohibiting carriers or States from pursuing any other mechanism that may address particular needs, but merely requiring carriers to implement E911 within a timetable *regardless of any mechanism*" (emphasis added), Second MO & O, Appendix C-9. Requiring small and rural carriers to comply with this rule, with no means for cost recovery would be economically devastating. Rather than addressing the issue, the Commission relies upon the possibility or the hope that the States will implement a cost recovery mechanism, or that small and rural carriers will be able to pass the costs on to their customers. This expectation is especially misplaced given the fact that there were problems developing state funding mechanisms even when the adoption of such mechanisms was a mandatory prerequisite to having E-991. This was what prompted a change in the regulation in the first place. To simply assume that the states will now proceed to act when they are not required to do so is patently unrealistic.

CorrComm has researched the cases interpreting the RFA, as amended, and has found very little guidance as to what effort an agency must make to comply with the provisions of the Act. *See*, for example, ValueVision Int'l., Inc. v F.C.C. , 149 F. 3d 1204, (D.C. Cir. 1998). In CorrComm's view, the RFA must be given substantive teeth. If the RFA is to mean anything other than some perfunctory verbiage tacked onto the end of agency rulemaking actions, the agency must truly evaluate and confront the effects of its proposed actions on small businesses and justify those effects when they are negative. The Commission's Order here clearly evaded that obligation.

D. The Commission's Action is Directly Anti-competitive in Violation of the Act

In the '96 Act, Congress adopted a very strong preference for competition as the single best means of ensuring the provision of high quality communications at reasonable prices. Indeed, the entire thrust of the Commission's regulatory policy in the last two decades has been to level the playing field so as to make competition possible and vibrant. (The national policy favors vigorous economic competition.) 47 U.S.C. 257(b). This E-911 action runs directly contrary to those well-established Congressional and regulatory policies.

As we have seen, the cost of providing Phase II E-911 service to a wireless carrier is enormous. The very nature of wireless service presumes a customer at no fixed location, thus requiring an additional infrastructure to pinpoint the location of a given emergency call. By contrast, and again as a result of the very nature of the service, wireline carriers have no problem identifying the location of a call originating from a fixed landline telephone. In this instance, the landline provider is vested with a

technological advantage over the wireless carrier at the starting line. The Commission's E-911 rules ignore this fundamental distinction in the two services. The rules require both kinds of carriers to provide E-911, a superficially even-handed rule. But by failing to recognize the huge cost differential involved, the Commission effectively cripples the ability of wireless carriers to compete against wireline carriers.

The Commission has fervently hoped that wireless telephony will one day become a sufficient alternative to wireline telephony to break the "natural" monopoly which has so long served as a given of the telecommunications landscape. *See*, for example, Amendment of Rules to Permit Flexible Service Offerings, CMRS, 11 FCC Rcd. 8965 (1996), allowing all CMRS carriers to provide fixed service in order to provide "competitive alternatives to traditional land exchange service.") Only good can come of making wireless service more competitive with wireline. Yet the E-911 action has exactly the opposite effect. It imposes on only one of the competitors a significant cost burden which must then be passed on to that carrier's customers alone. By imposing this unique burden on one of two competitors, the Commission's action makes telephone service less, not more, competitive, in contravention of Congress's intent and the Commission's avowed purpose. Specifically, the '96 Act requires the Commission to eliminate market entry barriers for small businesses in the provision of telecommunications. In making that determination, the Commission is required to promote the national policy favoring competition. 47 U.S.C. §§ 257(a) and (b). The Commission seems to have deleted the E-911 cost support requirement without any concern whatsoever for the potential effect on competition between wireline and wireless carriers.

E. The Forced Provision of E-911 Service is a Taking Requiring Compensation

The Fifth Amendment of the Constitution prohibits the taking of private property for public use without just compensation. As detailed above, the requirement that E-911 service be provided by privately owned CMRS carriers without any public cost recovery mechanism is a bald requirement that these carriers provide a service to the public for free. The carriers are required to construct and operate a service at their own expense for the public good with no corresponding compensation from the government. This is the very essence of the evil which the Fifth Amendment "takings" clause was designed to prevent. To be sure, some regulation of the operations of common carriers is necessary and useful to the purpose of the regulation itself. For example, a radio licensee can be compelled to employ shielding devices or methods to ensure that members of the public are not adversely affected by non-ionizing radiation. But when a publicly beneficial burden is imposed on an entity without relation to potential harms which the entity may cause, the burden constitutes a compensable taking.

This was the rationale of the Supreme Court in Dolan v. City of Tigard, 114 S Ct. 2309 (1994). There, a Planning Commission had required a property owner to dedicate a portion of her property for a storm drainage system and for a bike path as a condition of expanding her hardware store. The Court ruled that the imposition of these conditions (much like the requirement that E-911 service be provided as a condition of cellular licenseeship) constituted a taking. To avoid a compensable taking, there had to be an "essential nexus" between a legitimate state interest and the permit condition. In addition, the government bore the burden of establishing "rough proportionality" between the potential harm of the planned hardware store expansion and the burden which the

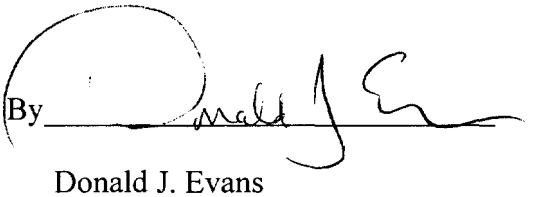
Planning Commission imposed. The Planning Commission failed to meet that burden, as the Commission has failed here. The operative rule of law is that there are limits to the extent to which publicly beneficial burdens may be imposed on firms as a condition of doing business.

CONCLUSION

For the reasons set forth above, CorrComm respectfully requests that the Commission restore to its regulations a requirement that the provision of E-911 Phase II service by CMRS carriers is subject to the implementation of a publicly funded cost support mechanism. Alternatively, CorrComm requests that the Commission consider the lopsided negative effect which this regulation will have on small carriers versus large ones, and wireless carriers versus wireline carriers, in the light of its obligations to consider the effects of its regulations on small businesses and on competition. In that light, a broader-based cost recovery mechanism must be established

Respectfully submitted,

CorrComm, L.L.C.

By 

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Its Attorney